

Government to Government Policy

National Indian Gaming Commission Government-to-Government Tribal Consultation Policy – published in the federal register March 31, 2004

The National Indian Gaming Commission ("NIGC" or "Commission"), in consultation with Federally-recognized Indian tribes, establishes and issues this Government-to-Government Tribal Consultation Policy, which shall take effect immediately and remain in effect until further order of the Commission.

I. Introduction

A. Fundamental Principles of the Government-to-Government Relationship

1. The United States of America has a unique government-to-government relationship with Federally-recognized Indian tribes, as set forth and defined in the Constitution of the United States and Federal treaties, statutes, Executive Orders, and Federal court decisions. Since its formation, the United States has recognized Indian tribes as sovereign nations, which possess and exercise inherent sovereign authority over their members and territory to the extent recognized and defined by the Constitution of the United States, Federal treaties, statutes, Executive Orders, and Federal court decisions. Pursuant to this unique government-to-government relationship, the Federal Government has enacted numerous statutes and promulgated numerous administrative regulations that establish and define its trust responsibilities to Indian tribes and address issues concerning tribal self-governance, tribal territory and resources, and tribal treaty and other rights.

2. A principal goal of long-standing Federal Indian policy is to support the federally recognized sovereignty of Indian tribes by promoting tribal economic development, tribal self-sufficiency, and strong tribal governance and self-determination over their internal affairs. In 1988, to further this policy and also address congressional concerns regarding the absence of clear Federal standards or regulations for the conduct of Indian gaming, Congress enacted the Indian Gaming Regulatory Act ("IGRA" or "Act"), 25 U.S.C. 2701 *et seq.*, for three specified purposes:

(a) To provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government;

(b) To provide a statutory basis for the regulation of Indian gaming adequate to shield it from organized crime and other corrupting influences; ensure that tribes are the primary beneficiaries of their gaming operations; and assure that the gaming is conducted fairly and honestly by both the operator and players; and,

(c) To declare that the establishment of independent Federal regulatory authority and Federal standards for Indian gaming and the establishment of the NIGC are necessary to meet congressional concerns regarding Indian gaming and protect it as a viable means of generating tribal governmental revenues and furthering the policies and purposes of IGRA.

B. Tribal, Federal, State and Local Rights and Interests Regarding the Operation and Regulation of Indian Gaming Under IGRA

1. The NIGC was established by IGRA as an independent Federal regulatory agency. The Act vests the Commission with certain regulatory powers and responsibilities for Indian gaming, including broad authority to promulgate such regulations and guidelines as it deems appropriate to implement the provisions of the Act.

2. IGRA recognizes and provides that the operation of gaming on Indian lands is primarily a function of tribal sovereignty. Indian gaming is conducted by tribal governments, who may use the net revenues derived from gaming only to fund tribal governmental operations or programs; provide for the general welfare of the tribe and its members; promote tribal economic development; donate to charitable organizations; and help fund operations of local government.

3. The regulatory framework established by IGRA for Indian gaming provides differing, but complementary, regulatory authority and responsibility to Indian tribes, the NIGC, the Secretary of the Interior,

and state governments, dependent upon which of three different statutorily defined classes of tribal gaming activity is conducted. Under IGRA, Class I gaming remains under the exclusive sovereign jurisdiction of Indian tribes and is not subject to the Act's other regulatory provisions. Indian tribes also retain primary sovereign regulatory authority and responsibility for the day-to-day regulation of Class II and Class III Indian gaming operations under IGRA. However, the Act also vests the NIGC with certain independent Federal regulatory powers and responsibilities regarding the regulation of Class II and Class III gaming activity on Indian lands. In addition, IGRA also requires that Class III Indian gaming activity be conducted in conformance with a Tribal-State compact that is in effect and approved by the Secretary of the Interior. Under IGRA, such Tribal-State Compacts may include negotiated provisions for state participation in the regulation of Class III tribal gaming activity conducted on Indian lands within the state.

4. IGRA's statutory system of shared regulatory authority and responsibility for Indian gaming will work most effectively to further the Act's declared policies and purposes, when the three involved sovereign governmental authorities work, communicate, and cooperate with each other in a respectful government-to-government manner. Such government-to-government relationships will make it possible for all three sovereign governments to mutually resolve their issues and concerns regarding the operation and regulation of Indian gaming, and efficiently coordinate and assist each other in carrying out their respective regulatory responsibilities for Indian gaming under IGRA.

5. Accordingly, the NIGC deems it appropriate to issue this Government-to-Government Tribal Consultation Policy, to promote and enhance the government-to-government relationships, consultations, and mutual cooperation among Indian tribes, the NIGC, other involved Federal departments and agencies, and state and local governments, regarding the operation and regulation of Indian gaming under IGRA.

II. NIGC Policy Making Principles and Guidelines

A. Fundamental Principles

The NIGC will adhere to and be guided by the following fundamental principles of Federal Indian policy, when formulating and implementing Federal regulatory policies, programs, procedures, requirements, restrictions, or standards that may substantially affect or impact the operation or regulation of gaming on Indian lands by a Federally-recognized tribal government under the provisions of IGRA:

1. The NIGC recognizes and respects the Federally recognized sovereignty of Indian tribes, which possess and exercise inherent sovereign authority over their members and territory and have certain rights to self-government over their internal governmental affairs under Federal law.

2. The NIGC recognizes and is committed to maintaining a respectful and meaningful government-to-government relationship with Federally-recognized Indian tribes and their authorized governmental leaders, when exercising and discharging its regulatory authority and responsibilities for Indian gaming under IGRA.

3. The NIGC acknowledges that Indian tribes retain and exercise primary sovereign authority and responsibility with respect to the day-to-day operation and regulation of gaming on their tribal lands under IGRA, subject to independent Federal regulatory oversight and the conditions, restrictions, and requirements of the Act, Tribal-State Compact provisions, Federal procedures in lieu of Tribal-State compacts, and NIGC regulations promulgated pursuant to the Act.

4. The NIGC will honor and respect the provisions of Tribal-State Class III Gaming Compacts that are duly approved by the Secretary of the Interior and in effect, or, in the alternative, Federal Class III tribal gaming procedures approved by the Secretary of the Interior, in lieu of a Tribal-State Compact, pursuant to IGRA and Department of Interior regulations.

5. To the extent practicable and permitted by law, the NIGC will engage in regular, timely, and meaningful government-to-government consultation and collaboration with Federally recognized Indian tribes, when formulating and implementing NIGC administrative regulations, bulletins, or guidelines, or preparing legislative proposals or comments for Congress, which may substantially affect or impact the operation or regulation of gaming on Indian lands by tribes under the provisions of IGRA.

6. The NIGC will encourage Federally-recognized Indian tribes and state and local governments to consult, collaborate and work cooperatively with each other in a respectful, good faith government-to-government

manner to mutually address and resolve their respective issues and concerns regarding the operation and regulation of gaming on Indian lands under IGRA, in furtherance of the policies and purposes of the Act.

7. The NIGC will also work cooperatively with other Federal departments and agencies and with state and local governments to enlist their interest and support to assist the Commission and Indian tribes in safeguarding tribal gaming from organized crime and other corrupting influences; providing adequate law enforcement, fire, and emergency health care services, and environmental protections for the health and safety of the public in tribal gaming facilities; and accomplishing the other goals of IGRA.

B. Other Policy Making Principles and Guidelines

To the extent practicable and permitted by law, the NIGC will also adhere to and be guided by the following additional principles and guidelines, when formulating and implementing Federal regulatory policies, programs, procedures, requirements, restrictions, or standards, that may substantially effect or impact the operation or regulation of gaming on Indian lands by a Federally-recognized tribal government(s) under the provisions of IGRA:

1. The NIGC acknowledges and will reasonably consider variations in the nature and scale of tribal gaming activity across Indian country, as well as variations in the extent and quality of tribal gaming regulation and state regulatory involvement under the different Tribal-State Compacts, when determining the need, nature, scope, and application of new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards for Indian gaming operations under IGRA.

2. The NIGC will also provide technical assistance, advice, guidance, training, and support to help Indian tribes and tribal leaders and employees understand and comply with Federal policies, regulations and standards for Indian gaming.

3. The NIGC will defer to tribally established regulations and standards for Indian gaming, when the Commission determines that they are permitted by IGRA and further its policies and purposes; that they adequately address congressional concerns regarding Indian gaming; that tribal compliance and enforcement are readily verifiable by the NIGC; and, that similar Federal regulations and standards are not statutorily required or necessary to implement the Act.

4. The NIGC will also encourage and provide technical assistance, advice, guidance, and support to Indian tribes and tribal leaders to formulate and implement their own regulatory policies, procedures, requirements, restrictions, and standards for their gaming operations, in lieu of similar Federal regulations and standards, if the Commission determines that the proposed tribal regulations and standards are permitted by IGRA and further its policies and goals; that they will adequately address congressional concerns regarding Indian gaming; that tribal compliance and enforcement will be readily verifiable by the NIGC; and, that similar Federal regulations and standards are not statutorily required or necessary to implement the Act.

5. The NIGC will not formulate and implement Federal regulatory policies, procedures, programs, requirements, restrictions, or standards for Indian gaming that will impose substantial direct compliance or enforcement costs on an Indian tribe(s), if the Commission determines that such Federal regulations and standards are not required by IGRA or necessary to implement its provisions or further accomplishment of its policies and purposes.

6. In general, the NIGC will strive to grant Indian tribes the maximum administrative and regulatory discretion possible in operating and regulating gaming operations on Indian land under IGRA; and also strive to eliminate unnecessary and redundant Federal regulation, in order to conserve limited tribal resources, preserve the prerogatives and sovereign authority of tribes over their own internal affairs, and promote strong tribal government and self-determination, in accordance with Federal Indian policy and the goals of IGRA.

C. Applicability

The NIGC will be guided by the above policy-making principles and guidelines in its planning and management activities, including budget development and execution, legislative initiatives and comments, and policy and rule making processes.

III. Tribal Consultation Procedures and Guidelines

A. To the fullest extent practicable and permitted by law, the NIGC is committed to regular, timely, and meaningful government-to-government consultation with Indian tribes, whenever it undertakes the formulation and implementation of new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards for Indian gaming, either by means of administrative regulation or legislative initiative, which may substantially affect or impact the operation or regulation of gaming on Indian lands by a tribe(s) under IGRA.

B. Based on the government-to-government relationship and in recognition of the sovereignty and unique nature of each Federally-recognized Indian tribe, the primary focus of the NIGC's consultation activities will be with individual tribes and their recognized governmental leaders. Consultation with authorized intertribal organizations and representative intertribal advisory committees will be conducted in coordination with and not to the exclusion of consultation with individual tribal governments. When the NIGC determines that its formulation and implementation of new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards may substantially effect or impact the operation or regulation of gaming on Indian lands by a tribe(s) under IGRA, the Commission will promptly notify the affected tribes and initiate steps to consult and collaborate directly with the tribe(s) regarding the proposed regulation and its need, formulation, implementation, and related issues and effects. Tribes may and are encouraged, however, to exercise their sovereign right to request consultation with the NIGC at any time they deem necessary.

C. The Chairman of the NIGC or his or her designee is the principal point of contact for consultation with Indian tribes regarding all NIGC programs and related policies and policy-making activities of the Commission under IGRA.

D. The NIGC will initiate consultation by providing early notification to affected tribes of the regulatory policies, procedures, programs, requirements, restrictions, and standards that it is proposing to formulate and implement, before a final agency decision is made regarding their formulation or implementation.

E. The NIGC will strive to provide adequate opportunity for affected tribes to interact directly with the Commission, to discuss and ask questions regarding the substance and effects of proposed Federal regulations and standards and related issues, and to provide meaningful input regarding the legality, need, nature, form, content, scope and application of such proposed regulations, including opportunity to recommend other alternative solutions or approaches. Such consultation will be conducted with tribes by means of scheduled meetings, telephone conferences, written correspondence, and other appropriate methods of communication, before a final agency decision is made regarding the formulation or implementation of the proposed Federal regulations or standards.

F. As part of the tribal consultation process, the NIGC will answer tribal questions and carefully consider all tribal positions and recommendations, before making its final decision to formulate and implement proposed new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards that may substantially affect or impact the operation or regulation of gaming on Indian lands by affected tribe(s) under IGRA.

G. As an independent Federal regulatory agency, the NIGC has authority and responsibilities under IGRA to conduct investigations, take enforcement actions, and render regulatory and quasi-judicial decisions regarding the approval of tribal gaming ordinances and third party management contracts, the suitability of management contractors to participate in Indian gaming, and tribal compliance with the Act. The nature of these statutory responsibilities necessarily places some limitations on the nature and type of consultation that the Commission may engage in with the involved tribes. These limitations on consultation are necessary to preserve the integrity of the NIGC's investigations, enforcement actions, and decision-making processes, and also comply with provisions of the Federal Administrative Procedures Act that limit Commission contact with parties in contested cases. Nevertheless, the NIGC will endeavor, to the extent practicable and permitted by law, to reduce procedural impediments to consulting directly with tribal governments to resolve issues regarding the operation and regulation of Indian gaming under IGRA.

H. The NIGC will, to the extent necessary and appropriate, consult with affected tribes to select and establish fairly representative intertribal work groups, task forces, or advisory committees to assist the NIGC and tribes in developing administrative rules or legislative recommendations to address and resolve certain issues of regulatory concern regarding the operation and regulation of Indian gaming under IGRA.

I. The NIGC will, to the extent it deems practicable, appropriate, and permitted by law, explore and consider the use of consensual policy making mechanisms, including negotiated rulemaking, when formulating and implementing Federal regulatory policies, procedures, programs, requirements, restrictions, or standards that may substantially effect or impact sovereign tribal rights of self-government regarding the operation or regulation of gaming under IGRA, or related tribal resources, or tribal treaty or other rights.

IV. Increasing Flexibility for Tribal Waivers of Regulatory Requirements

A. The NIGC will review the provisions and processes under which Indian tribes may apply for waivers of regulatory requirements under NIGC regulations, and take whatever steps it determines appropriate and permitted by law to further streamline those processes, consistent with the policy making principles and guidelines set forth in Part II of this policy.

B. This Part only applies to regulatory requirements that are discretionary and subject to waiver by the NIGC.

V. General Limitations

This policy is not intended to nor does it create any right to administrative or judicial review, or any other right, benefit, trust responsibility, or cause of action, substantive or procedural, enforceable by any party against the United States of America, its departments, agencies or instrumentalities, its officers, or employees, or any other persons or entities.

This policy is not intended to create a forum for resolution of specific disputes or issues that are the subject of litigation between the NIGC and a tribe(s) nor is it meant to replace presently existing lines of communication.